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Honest-Services Fraud: A (Vague) Threat to Millions of Blissfully Unaware (and Non-Culpable) American Workers

Julie R. O'Sullivan

Georgetown University Law Center, osullij1@law.georgetown.edu

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63 Vand. L. Rev. (En Banc) 23-48 (2010)

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Honest-Services Fraud: A (Vague) Threat to Millions of Blissfully Unaware (and Non- Culpable) American Workers

*Julie R. O'Sullivan**

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It is my firm belief that if any statute is unconstitutionally vague, it is 18 U.S.C. § 1346, at least as applied to cases in which employees of private entities are prosecuted for depriving their employers of a right to their honest services (so-called “private cases”).¹ Objections to vagueness rest on due process. “Vagueness may

* Professor, Georgetown University Law Center.

1. Because we are charged with discussing *Skilling v. United States*, I will not address the second category of honest-services cases—those involving prosecutions of public officials for

invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.”² The Supreme Court’s vagueness precedents do not provide much guidance regarding what objective factors one should look to in evaluating the applicability of these two concerns in a given context. Rather, the Court tends simply to reach a conclusion and explain that one or both of these reasons back up its judgment.

That said, I hope to demonstrate below that, under any standard, § 1346 fails both tests in the private cases. Fair notice concerns are certainly present when one recognizes that *anyone* could be subjected to indictment and the humiliation and stresses of a public trial, and begin serving jail time upon conviction, only to have some court of appeals decide that what she did was not, in law, a crime because of a new judicially-imposed limitation. Indeed, in the *Skilling* argument, the Chief Justice seemed very disturbed by the notion that effective notice could be provided only by lawyerly parsing of the vast—and conflicting—caselaw underlying honest services; he asserted that this common law evolution in the meaning of the term “doesn’t sound like fair notice of what’s criminal.”³ More importantly, these cases demonstrate the terrifying power that such statutes give prosecutors. “Where federal prosecutors can make an ‘honest services’ case against *anyone* under existing ‘standards’ ”—and I believe they can—“a vast potential for arbitrary, discriminatory, and unfair prosecutorial choices inevitably follows.”⁴

The appropriate remedy is to strike the statute, not rewrite it. For a variety of reasons—including separation of powers, the principle of legality, and the rule against retroactive lawmaking—courts are not permitted to fill in the content of otherwise vague legislation; there is

deprivation of the public’s or government’s right to their honest services (so-called “public honest-services cases”). I cannot resist noting, however, that reading the requirements of the public honest services prosecutions to parallel the contents of 18 U.S.C. § 201 would considerably clarify the reach of § 1346 in that context and could solve other difficulties. See Sara Sun Beale, *Comparing the Scope of the Federal Government’s Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 699, 713 (2000).

2. City of Chicago v. Morales, 527 U.S. 41, 56 (1999); see also Kolender v. Lawson, 461 U.S. 352, 357 (1983).

3. Transcript of Oral Argument at 46-47, *Skilling v. United States*, 130 S. Ct. 393 (2009) (No. 08-1394) (March 1, 2010).

4. Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 660 (2006).

not (or should not be) a common law of crime.⁵ Thus, the Court cannot fix vague statutes by “legislating” their content. It is true that occasionally the Court will save an underdefined statute by reading into it an enhanced mens rea. It does so to ensure that a criminally culpable mental state attends the conduct at issue, thus rendering any fair notice complaints far less compelling.⁶ And, as I will argue below, if the Court decides not to strike the statute entirely, I believe that it ought to pursue that course here. But holding the statute to be void for vagueness is by far the better approach for two reasons. First, the statute is so vague that tweaking mens rea will not be enough. Second, enhancing the culpable mental state required may address fair notice problems, but it may not provide real limits on the government’s enforcement discretion.

In terms of remedy, it is also important to distinguish between vagueness and ambiguity—a distinction which is well recognized in contract law⁷ but is not sufficiently policed by criminal courts. Ambiguity presents a more limited problem and is present when a term or phrase has two competing applications or connotations, and the Court is tasked with selecting the most defense-favorable one under the rule of lenity.⁸ The distinction is important because the Supreme Court sometimes undertakes, under the rubric of the rule of lenity, to fix ambiguous statutes rather than to send them back, as it would vague statutes, for legislative definition.

The Court granted certiorari in three honest-services cases this term—two that involve private employment honest-services theories, *Black v. United States*⁹ and *Skilling v. United States*,¹⁰ and one that involves the prosecution of a state official for public honest-services fraud, *Weyhrauch v. United States*.¹¹ I believe that the petitioners in *Black* and *Weyhrauch* were mistaken in relying on the rule of lenity in

5. See generally *United States v. Hudson*, 11 U.S. 32 (1812).

6. See, e.g., *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 526 (1994) (“[T]he Court has recognized that a scienter requirement may mitigate a law’s vagueness, especially with respect to the adequacy of notice ... that [the] conduct is proscribed.”) (citation omitted).

7. See, e.g., E. ALLAN FARNSWORTH, *CONTRACTS* § 7.8, at 441-442 (Aspen Publishers 4th Ed. 2004). A rule is vague when the statute defines “not a neatly bounded class but a distribution about a central norm.” *Id.* at 441 (internal citations omitted).

8. *Id.* For examples of ambiguity in criminal statutes, see, e.g., *United States v. Santos*, 553 U.S. 507 (2008) (holding that money laundering term “proceeds” was ambiguous, and that the rule of lenity required that proceeds be read to refer only to “profits,” not to “receipts”); *United States v. Kozminski*, 487 U.S. 931, 952 (1988) (referencing the rule of lenity in reading involuntary servitude to prohibit only compulsion of services through physical or legal coercion).

9. 530 F.3d 596 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2379 (2009).

10. 554 F.3d 529 (5th Cir. 2009), *cert. granted*, 130 S. Ct. 393 (2009).

11. 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (2009).

arguing for a narrower reading of the statute¹² because ambiguity is not at issue. The Court is not asked to elect between two equally plausible definitions of a term (or grammatical constructions of a phrase) embedded in otherwise reasonably articulated elements. Rather, the Court is tasked with making many choices, among numerous alternatives, in defining what conduct, mens rea, and attendant circumstances must be proved. What is at issue is vagueness on steroids: a statute that is vague not only “in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but [also] . . . *in the sense that no standard of conduct is specified at all.*”¹³ I hope that the Court will resist any impulse to give the statute substantive content because § 1346 simply cannot be “fixed” without a substantial departure from a basic constitutional principle: namely, that the responsibility for articulating criminal norms lies in our elected officials, and that courts may not accept legislative delegations of common lawmaking powers when criminal sanctions are possible.¹⁴

After attending the oral arguments in *Black*, *Weyhrauch*, and *Skilling*, I thought that a majority of the Court was likely to strike the statute as unconstitutionally vague. Upon reflection, however, the Court may decide for a number of reasons that, in view of Congress’s failure to accept the Court’s invitation in *McNally v. United States* to “speak more clearly than it has,”¹⁵ it must take up the chore of articulating the basic elements of honest-services liability.

First, although I believe the due process vagueness challenge has been appropriately raised and briefed, others may not. In *Black* and *Weyhrauch*, the petitioners’ briefs raised the vagueness argument only in service of their constitutional avoidance theory of statutory construction. That is, in both cases, petitioners argued that to avoid serious constitutional issues under separation of powers, federalism, and due process principles, the Court should read into the statute in private cases (*Black*) a requirement that the “scheme to defraud” “intended or contemplated loss” to the victim or that the conduct at issue created a “foreseeable risk of economic harm,”¹⁶ and in public

12. Brief for the Petitioners at 43-44, *Black v. United States*, No. 08-876 (2009); Brief for Petitioner, *Weyhrauch v. United States* at 20-21, No. 08-1196 (2009). The government, during oral argument, also relied on a case in which ambiguity was at issue to argue that § 1346 is not vague. Transcript of Oral Argument at 44-46, *Weyhrauch*, 129 S. Ct. 2863 (No. 08-1196) (Dec. 8, 2009) (citing *Kozminski*, 487 U.S. 931).

13. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (emphasis added).

14. *See, e.g., United States v. Bass*, 404 U.S. 336, 348 (1971).

15. 483 U.S. 350, 360 (1987).

16. Brief for the Petitioners at 19, *Black v. United States*, No. 08-876 (2009).

cases (*Weyhrauch*) a requirement that the government must prove some duty to disclose, independent of § 1346 and existing in either federal or state law. At oral argument, the petitioners contended that the vagueness challenge was legitimately before the Court, a position to which the Solicitor General's office took exception.¹⁷ The petitioner in *Skilling* did raise the constitutional issue squarely. However, given that the bulk of the briefs and the oral argument in *Skilling* was consumed by a discussion of the other question presented relating to jury prejudice, there is some question whether the Court will reach the challenge to § 1346 in that case.¹⁸

Second, the Court may well be concerned about the real-world consequences and disruption that ruling § 1346 unconstitutionally vague may cause. Such a determination would void a great number of public and private honest-services convictions secured over the last twenty years.¹⁹ It would also mean that federal prosecutors would have a much more limited arsenal with which to address righteous prosecutions of state and local corruption.²⁰

Finally, the Court may run into doctrinal difficulties in holding the statute to be facially vague. Many, if not most, successful

17. During the oral arguments in *Black* and *Weyhrauch*, a facial vagueness challenge was raised and argued before the Court. Transcript of Oral Argument at 4-5, 7, *Black*, 129 S. Ct. 2379 (No. 08-876) (Dec. 8, 2009). *Black*'s counsel argued that the question presented has vagueness as a predicate, meaning the underlying question is open to the Court. *Id.* Deputy Solicitor General Dreeben initially objected to what he characterized as a new issue, *id.* at 24-28, but in the end said that he was not shying away from the vagueness question and conceded that vagueness has been raised by members of this Court "as a legitimate concern." Transcript of Oral Argument at 51-52, *Weyhrauch*, 129 S. Ct. 2863 (No. 08-1196) (Dec. 8, 2009).

18. Many of my friends in the Supreme Court bar were surprised by the Court's grant of certiorari in *Skilling*. The Court had already determinedly waded into the quagmire of honest-services mail and wire fraud under 18 U.S.C. § 1346 by granting certiorari in *Black* and *Weyhrauch*. Some Court handicappers thus forecast that the Court really took *Skilling* to decide the second issue presented, which relates to the standards applicable to resolving venue objections where, due to the localized and high-profile nature of the alleged conduct, jury prejudice may be inevitable. The petitioner pressed this issue first in its brief and at argument, generally treating the honest-services issue more summarily. If this is where the Court's true interest lies in *Skilling*, the decision will be of greater import for terrorism prosecutions than for the future contours of federal fraud statutes.

19. See, e.g., Petition for Writ of Certiorari, *Rybicki v. United States*, 543 U.S. 809 (No. 03-1375) (2004) (noting that § 1346 has been considered in more than 270 federal decisions between 1988 and March 2004). It seems clear that such a ruling would require honest-services convictions still pending on direct appeal to be vacated, and the ruling probably would apply retroactively even to cases that have become final under *Teague v. Lane*, 489 U.S. 288, 311 (1989) ("[A] new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"). The real question will be whether defendants can seek relief under 28 U.S.C. § 2255 or other avenues for relief (e.g., *coram nobis*) but that is beyond the scope of this essay.

20. See, e.g., Randall D. Eliason, *Surgery with a Meat Axe: Using Honest Services Fraud to Prosecute Federal Corruption*, 99 J. CRIM. L. & CRIMINOLOGY 929, 704-18 (2009).

vagueness challenges have prevailed because the statute was both vague *and* overbroad in the sense that it potentially applied to constitutionally protected conduct. So, for example, loitering statutes may be stricken in part because they may impinge upon rights of speech and assembly. The Court has repeatedly suggested that it will not entertain facial vagueness challenges where no overbreadth threatens First Amendment values.²¹ Where no constitutional values are threatened, the Court does not wish to allow persons who ought to know that their conduct is proscribed to litigate the vagueness claims of others—not before the Court—who have legitimate “fair notice” arguments concerning the statute’s reach. Even if it does entertain a facial challenge, some on the Court have argued that the defendants must demonstrate that the statute is vague in all its applications (i.e., that there is no case to which the statute could be legitimately applied).²² And I believe that the Court would conclude that § 1346 can legitimately be applied—in public and private cases—where the defendant has been bribed.

Should the Court treat these cases as as-applied challenges, there is some question whether the Court will view the particular defendants here as persons who, no matter the outer contours of honest-services fraud cases, should have had notice that what they were doing was wrong. Indeed, in the only case to expressly press a due process vagueness claim—*Skilling*—the Chief Justice seemed very skeptical about Mr. Skilling’s fair notice argument, asserting with some vigor that he did not see the difficulty in applying the statute to Mr. Skilling’s conduct.²³

There is one possible “out” here. In *City of Chicago v. Morales*,²⁴ the Court struck down as vague Chicago’s gang loitering ordinance, which prohibited criminal street gang members from loitering with one another in a public place. Justice Breyer filed a concurring opinion that provides a theory upon which the petitioners here could succeed in a facial challenge. The two concerns underlying the vagueness doctrine—fair notice and undue discretion—are independently considered. Justice Breyer said that if every application of the statute represented an exercise of unlimited discretion, then the ordinance was invalid in all its applications. In such cases, the statute was

21. See, e.g., *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 & nn. 6-7 (1982).

22. *City of Chicago v. Morales*, 527 U.S. 41, 55 & n.22 (1999); *id.* at 77-83 (Scalia, J., dissenting).

23. Transcript of Oral Argument at 22, *Skilling v. United States*, 130 S. Ct. 393 (No. 08-1394) (March 1, 2010).

24. 527 U.S. 41 (1999).

unconstitutional not because it provided insufficient notice, but because it did not provide sufficient minimal standards to guide the police. The ordinance would not escape facial invalidation, then, simply because it may have provided fair notice to some individual defendants whose conduct it prohibited.²⁵ Justice Scalia (who may be required to rethink his vehement objection to this analysis in *Morales*) posed a hypothetical during oral argument that illustrates the wisdom of this approach: if a statute criminalizes doing “a bad act,” the fact that murder would clearly be covered does not preclude a vagueness challenge based on the unlimited enforcement discretion the statute permits.²⁶

If for the above (or other) practical or doctrinal reasons, the Court decides to re-jigger the statute rather than striking it, I urge the Court to focus on narrowing the statute. The Court may do so not only by accepting the concessions made by the Deputy Solicitor General during oral argument,²⁷ but also by reading § 1346 to provide an appropriately demanding level of mens rea. That is, it should require that the “intent to defraud” element include an intent to injure or harm, in addition to an intent to deceive. As I hope to demonstrate below, the existing approaches the courts of appeals have used to limit the scope of private honest-services cases are ineffective and, where they are not grounded in the statutory language or common law principles, illegitimate. Limiting the reach of § 1346 by reading the “intent to defraud” element to include an intent to harm has the virtue of remaining true to longstanding conceptions of mail and wire fraud.

An intent to defraud must be proved in both public and private honest-services cases, so the Court need not devise different limitations for these two categories of cases (which are based on the same statutory text!). Although I will restrict my discussion to honest

25. *Id.* at 71-73 (Breyer, J., concurring in part and concurring in the judgment).

26. Transcript of Oral Argument at 44, *Skilling v. United States*, 130 S. Ct. 393 (No. 08-1394) (March 1, 2010).

27. During the oral arguments, the government made a number of arguments/concessions that narrowed the scope of § 1346. By so doing, it underscored the extent to which the Court would have to “legislate” in order to arrive at a limiting construction. In private cases, the government argued that the statute covers bribes, kickbacks, and undisclosed conflicts of interest by an agent or fiduciary who, using the powers of his office, takes action to further his personal, financial interests. The government stressed that enforcement discretion in such cases is limited by the requirements that the misrepresentation or non-disclosure be material and that the defendant intend to deceive. In public cases, the government argued that conviction is appropriate when a legislator, having an undisclosed financial conflict of interest, takes official action that furthers his personal interest without telling the decision-making body to which he belongs. The government stressed that the application of § 1346 is limited in these cases by the requisite mens rea: that the legislator knew he was breaching a duty and intended to deceive.

services as applied under the mail and wire fraud statutes because they are the prohibitions whose scope is at issue in the trilogy of cases before the Court, § 1346 by its terms also defines what a “scheme to defraud” means under the bank, health care, and securities fraud prohibitions in Chapter 63 of Title 18.²⁸ A refinement of what the “intent to defraud” means for purposes of an honest-services “scheme to defraud” would have the advantage of clarifying the reach of those sections as well.

Finally, my proposed approach is also consistent with the Court’s emphasis on ensuring that some consciousness of wrongdoing must be present where the criminal stigma is threatened, as well as its occasional use of *mens rea* to limit the scope of vague statutes that do not provide defendants fair notice that their conduct is proscribed. Honest-services cases punish conduct that is not necessarily independently proscribed as criminal and do not require proof of any real or threatened economic harm. In such circumstances, the Court ought to ensure that offenders, in breaching their duties, are animated at the very least by an intent to harm or injure.

I. THE STATUTE REALLY *IS* VAGUE, AND THE LIMITING PRINCIPLES IDENTIFIED THUS FAR ARE INEFFECTIVE.

The Court’s criteria in evaluating vagueness may not be clear, but when courts (let alone ordinary citizens) cannot agree on what *conduct*—attended by what *mental state* and what *attendant circumstances*—constitutes a crime, it is a vagueness trifecta. To illustrate my point, consider a hypothetical. Susan is a temp, working as an independent contractor for ABC Company. She knows that company policy mandates that employees not use ABC Company computers for personal business in the course of the workday. But the auction ends for a pair of darling shoes on eBay at 2 p.m., and she takes a few minutes out of her workday to bid on that coveted pair using her work computer. Elated in victory, she promptly pays for them using PayPal and prints out the receipt on an ABC Company printer. Is she guilty of a federal felony, subject to up to twenty years’ imprisonment?

A cognizable scheme to defraud under the mail and wire fraud statutes requires (at least) proof of: (1) fraud—i.e., the defendant, acting with an intent to defraud, either made a material misstatement or failed to disclose material information in the face of a legal duty; and (2) a cognizable object of that fraud—i.e., either the

28. See 18 U.S.C. §§ 1344, 1347, 1348.

deprivation of the victim’s money or property (so-called “money-or-property” cases) or some right the victim claimed to the defendant’s honest services (the “honest-services” cases). In honest-services cases, courts tend to (improperly) conflate these elements. That is, if they find an intentional breach of some duty the defendant owes to the public or his employer, and a failure to disclose that breach, courts will deem both the fraud and the deprivation of honest-services elements satisfied. (A head’s up for purposes of future discussion: I believe that failing to separately consider these two questions has resulted in errors such as a failure to recognize that what is needed to prove fraud—including the intent to defraud—is not dependent on whatever object is alleged.) With this introduction, let us now turn to sketching out the “mess”²⁹ surrounding the definition of what conduct, mens rea, and attendant circumstances are necessary or sufficient to anchor an honest-services conviction.

A. Conduct

Most private honest-services cases turn on whether there has been a breach of a duty of honest services and whether the defendant fraudulently failed to disclose that breach. This formulation sounds simple; in reality, it is anything but, as numerous circuit splits attest.

1. Duty of Honest Services?

Does Susan, as a temp working as an independent contractor, have a duty to render honest services to ABC Company? Federal courts are split on whether a duty of honest services can arise only out of a fiduciary relationship, but the majority seem to reject such a bright-line rule.³⁰ Most federal courts cite to principles of agency law—finding, for example, that *any* employment relationship creates a duty of loyalty and thus honest services—but fail to identify any basis for believing that Congress intended to criminalize the *Restatement of Agency*.³¹ If as the government contends and most circuits hold, every

29. Transcript of Oral Argument at 46, *Black v. United States*, 129 S. Ct. 2379 (No. 08-876) (Dec. 8, 2009) (Scalia, J.).

30. See, e.g., *United States v. Rybicki*, 354 F.3d 124, 141-42 & n.17 (2d Cir. 2003) (en banc) (holding that the duty that must be breached is one owed by an employee to an employer, or by “a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers”); Cf. *United States v. Frost*, 125 F.3d 346, 366 (6th Cir. 1997); *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 974 (D.C. Cir. 1998).

31. In the *Skilling* argument, Justice Breyer responded to the government’s contention that no intent to violate the law need be shown in honest-services cases by quipping that “if you’re not saying [that an intention to violate the law is required,] then what the person has to carry

worker in the United States bears a duty of honest services to her employer, the scope of potential liability is breathtaking. Moreover, if agency principles are determinative in sketching out these criminally enforceable duties (as the government seems to believe), it is worth noting that principal-agent duties run both ways. Presumably the government can also criminally prosecute employers who fail to meet *their* duties to conform to their contracts with agents, to indemnify agents in specific circumstances, to disclose certain matters, and to deal with their agents “fairly and in good faith.”³²

2. Breach?

The potential breadth of a duty of honest services raises the critical question of whether *any* breach of employer-defined rules qualifies, or if only some subset of serious breaches should suffice. That is, should courts simply accept that Susan’s knowing violation of the computer-use rules is actionable, or should they attempt to restrict the scope of § 1346 to some category of breaches that are inarguably corrupt or threaten actual harm? If the former, obviously we must ask whether Congress could really have meant to delegate to private employers the power to promulgate criminally enforceable employment rules in their employee manuals. This alternative obviously creates grave problems of fair notice and, given that most workers are likely to stumble over a rule or two in the course of their employment, an enormous potential for arbitrary and discriminatory enforcement. But the latter alternative raises a serious constitutional problem: How can courts appropriately carve a heartland of honest-services cases—out of all possible violations of workplace rules—for criminal sanction without any legislative guidance?

The government argues that courts have, before *McNally* and after § 1346, identified a core of conduct that gives content to the otherwise-meaningless words “honest services.” The government, and many courts of appeals, consistently say that “private-sector honest services cases fall into two general groups, cases involving bribes or kickbacks, and cases involving self-dealing”³³—whatever “self-dealing”

around with them is an agency treatise” to determine whether they owe their employer a duty of honest services and a duty to disclose, the breach of which is sanctionable by jail time. Transcript of Oral Argument at 54-55, *Skilling v. United States*, 130 S. Ct. 393 (No. 08-1394) (March 1, 2010).

32. RESTATEMENT OF AGENCY §§ 8.13-8.15 (2005).

33. *Rybicki*, 354 F.3d at 139. As the Second Circuit recently explained while sitting en banc: In the bribery or kickback cases, a defendant who has or seeks some sort of business relationship or transaction with the victim secretly pays the victim’s employee (or causes such a payment to be made) in exchange for favored treatment. . . . In the self-

means. Any assertion that private honest-services cases before § 1346 only concerned bribes/kickbacks and self-dealing is untrue, and I have seen no empirical basis to substantiate the government's constant refrain that these are indeed the core of honest-services cases. Certainly prosecutors have pursued, and some courts have accepted, a variety of theories outside this "heartland." For example, prosecutors have "brought to justice," among others, a coach who improperly helped players with their coursework to ensure their eligibility to play,³⁴ a professor who helped his students plagiarize work to secure degrees to which they might not otherwise be entitled,³⁵ a lawyer who operated under an undisclosed conflict of interest,³⁶ and a city contractor who did not fulfill his contractual obligation to pay his workers on a city project at a certain pay scale.³⁷ But even if the government is correct that the caselaw reflects a core of private honest-services cases, why should the choices prosecutors have made in selecting cases in the past be determinative? And why wouldn't the Court's decision to restrict § 1346 to just these cases involve a forbidden rewriting of the statute?

At oral argument, the government asserted that the statute's scope is limited by a further requirement that the breach happened while the defendant was "exercising the powers of his office," purportedly eliminating liability in our computer-misuse example as well as a hypothetical Justice Breyer posed about the exposure of an employee who lied when taking a day off to attend a ball game.³⁸ This official-act requirement is dubious for at least three reasons. First, it is made up out of whole cloth. I have read many honest-services opinions, and I do not recall seeing this requirement in any of the private cases, giving lie to the government's argument that the core elements of honest-services cases are clearly demarcated in caselaw. Second, I do not agree with the government's application of this

dealing cases, the defendant typically causes his or her employer to do business with a corporation or other enterprise in which the defendant has a secret interest, undisclosed to the employer.

Id. at 139-40.

34. *United States v. Gray*, 96 F.3d 769, 772 (5th Cir. 1996).

35. *United States v. Frost*, 125 F.3d 346, 353 (6th Cir. 1997) (affirming conviction).

36. *United States v. Bronston*, 658 F.2d 920, 922 (2d Cir. 1981) (affirming conviction).

37. *United States v. Handakas*, 286 F.3d 92, 96 (2d Cir. 2002) (overturning honest-services conviction on vagueness grounds).

38. Transcript of Oral Argument at 37-39, *Black v. United States*, 129 S. Ct. 2379 (No. 08-876) (Dec. 8, 2009) (relating ball-game hypothetical discussion); Transcript of Oral Argument at 51, *Skilling v. United States*, 130 S. Ct. 393 (No. 08-1394) (March 1, 2010) (responding to a hypothetical about improper computer use, the government argued "I'm not even sure in the personal computer use case that the government could successfully show that the employee had misused his official position.").

principle. If, as seems logical, one were to reference the criminal entity-liability precedents for determining whether an agent was acting within the scope of her employment, Susan's computer use would suffice as an official act. Finally, this limitation is not sensible because it does not necessarily track what employers may believe are important versus unimportant violations. For example, the government argued that employee deception regarding days spent playing "hooky" would not constitute honest-services fraud because of this limitation, but many employers consider such conduct a serious breach of employees' duties, and one which warrants dismissal.³⁹

3. Duty to Disclose?

The next question relates to whether employees have a duty to disclose. Silence is not fraud; generally a duty to disclose "arises [only] when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.'"⁴⁰ It is not clear what law or relationships are sufficient to create a duty to disclose because this is a question that rarely receives separate treatment. For reasons that are never explained, most courts appear to believe that if there is a duty of loyalty, there is an accompanying duty of disclosure as well. But this may not always be so; the *Restatement of Agency* does not contain a blanket disclosure requirement.⁴¹ Indeed, in *Weyhrauch*, a state statute prohibited legislator Weyhrauch's alleged conduct (negotiating for a job with a company that had business pending before the legislature). But the District Court held that the Alaska law did not attach a *disclosure requirement* to the prohibition. Thus, according to the District Court, Weyhrauch had a honest-services duty to the public that was arguably breached when he solicited employment allegedly in violation of state law, but because there was no independent disclosure requirement, there was no violation of § 1346.⁴²

39. Indeed, during the recent snow storm in Washington, D.C., many employees were summarily fired for calling in sick. See Theresa Vargas, *D.C. Hospital Fires 11 Nurses, 5 Staffers for Snowstorm Absences*, WASH. POST, Feb. 28, 2010, at A1.

40. *Chiarella v. United States*, 445 U.S. 222, 228 (1980), quoting RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1976).

41. ALLI, RESTATEMENT (THIRD) OF AGENCY § 8.11 (2005).

42. See, e.g., Brief for the United States at 5-7, *Weyhrauch v. United States*, at 5-7, 129 S. Ct. 2863 (No. 08-1196) (2009). See also Transcript of Oral Argument at 49-53, *Skilling v. United States*, 130 S. Ct. 393 (No. 08-1394) (March 1, 2010) (asking questions concerning when a defendant ought to know he bears a duty of honest services and separate duty to disclose).

B. Mental State

There is agreement among the circuits that a specific intent to defraud must be proved in mail and wire fraud cases, and that an intent to deceive through misrepresentation (or an actionable failure to disclose) is part of that intent. But there is a split in the circuits on whether an intent to defraud also requires proof of an intent to harm or injure in money-or-property cases.⁴³ The First Circuit sitting en banc held that the scheme-to-defraud element of the bank-fraud statute does not require proof of an intent to injure or harm where the object of the fraud is the bank's money or property. That court's reasoning would apply equally to the mail and wire fraud context.⁴⁴

The Second Circuit leads the contingent that require such proof in cases where the object of the fraud is money or property.⁴⁵ For example, in *United States v. Gabriel*, the Second Circuit held that the district court had erred (harmlessly) in instructing the jury that "a defendant acts with a[n] . . . intent to defraud if he participates in the fraudulent scheme with *some realization* of its fraudulent or deceptive character and with *recognition of its capacity* to cause harm to the victims of such deception."⁴⁶ As the Second Circuit subsequently explained: "It is not sufficient that defendant realizes that the scheme is fraudulent and that it has the capacity to cause harm to its victims. Instead, the proof must demonstrate that the defendant had a conscious knowing intent to defraud . . . [and] that the defendant contemplated or intended some harm to the property rights of the victim."⁴⁷

43. Compare *United States v. Walker*, 191 F.3d 326, 335 (2d Cir. 1999) ("While the scheme to defraud need not have been successful, the defendant must have contemplated some actual harm or injury to the victims."), with *United States v. Kenrick*, 221 F.3d 19, 27-29 (1st Cir. 2000) (holding that in the context of a bank fraud charge, a "scheme to defraud" does not require an intent to injure or harm), and *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 973-74 (D.C. Cir. 1998) (same).

44. *Kenrick*, 221 F.3d at 27-29; see also *United States v. Welch*, 327 F.3d 1081, 1104-06 (10th Cir. 2003); *United States v. Everett*, 270 F.3d 986, 991 (6th Cir. 2001).

45. See, e.g., *Walker*, 191 F.3d at 334-36; *United States v. Chandler*, 98 F.3d 711, 714-15 (2d Cir. 1996); *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994) (holding proof of fraudulent intent, including an intent to harm, is required); *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180 (2d Cir. 1970); see also *United States v. Ervasti*, 201 F.3d 1029, 1035 (8th Cir. 2000) (noting that "intent to harm is the essence of a scheme to defraud"); *Frost*, 125 F.3d at 368; *United States v. Cochran*, 109 F.3d 660, 667-669 (10th Cir. 1997); *United States v. Jain*, 93 F.3d 436, 441 (8th Cir. 1996); *United States v. Stouffer*, 986 F.2d 916, 922 (5th Cir. 1993).

46. 125 F.3d 89, 96-97 (2d Cir.1997) (emphasis added); see also *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987); *Regent Office Supply*, 421 F.2d at 1182.

47. *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir.1999) (internal citations and quotations omitted).

It is at this point that the distinction between proof of fraud and proof of the object of the fraud, discussed above, is important. Given that the specific intent to defraud is required for proof of fraud—and is common to *all* statutory schemes to defraud—its definition should be same whether the case is charged as an honest-services or a money-or-property case. Thus, circuits that require proof of an intent to injure should do so regardless of what the object of the fraud is alleged to be. This does not appear to be true (save, perhaps, in the Eighth Circuit).⁴⁸ Even in the Second Circuit, the government does not need to prove an intent to harm or injure in honest-services cases.⁴⁹

In honest-services cases, then, the circuit courts generally express the required intent as an intent to deceive wedded to an “intent to deprive another of the intangible right of honest services.”⁵⁰ Another formulation of the latter intent, perhaps a variation on a theme, is that “[t]he prosecution must prove that the employee intended to breach a fiduciary duty.”⁵¹ To return to our hypothetical, all that must be shown is that Susan’s undisclosed use of a computer to buy shoes was done with full knowledge that this contravened the workplace rules (intent to breach), and that her failure to tell her employer was intentional (intent to deceive).

By definition, honest-services fraud requires no actual harm to the employer be shown (if there were economic harm, it would have been charged as a money-or-property case).⁵² Generally, in criminal law, where the harm or threatened harm flowing from the prohibited conduct is negligible, liability attaches only upon a showing of serious mental culpability. Judged in this light, the absence of a corrupt or harmful intent requirement is troubling. Certainly it is inappropriate that a significantly lower intent standard is applied in honest-services cases than in money-or-property cases, where a threat of actual, quantifiable economic harm must also be proved.

The government repeatedly emphasized in its briefs and at oral argument that the requirement of an intent to deceive provides an ample guarantee that only truly guilty actors will be prosecuted, thus providing fair notice and restraining the discretion of federal

48. See *United States v. Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999) (describing the mens rea element as “caus[ing] or intend[ing] to cause actual harm or injury, and in most business contexts, that means financial or economic harm”).

49. *Rybicki*, 354 F.3d at 145.

50. *Id.*

51. *Frost*, 125 F.3d at 368.

52. See, e.g., *id.* at 369 (“[A] defendant accused of scheming to deprive another of honest services does not have to intend to inflict an economic harm upon the victim.”).

prosecutors. This is exceedingly unlikely. First, in this context, proving an intent to deceive is not much of a burden, because such intent is usually inferred from the fact that the breach of the rule was known and not disclosed. More important, the culpability of the deception depends on the seriousness of the undisclosed conduct. Suppose that the undisclosed violation is *de minimis*—something, most employers would consider not worth hearing about let alone sanctioning, like Susan’s two-minute computer abuse. In such cases, the deception hardly seems to merit a stint in the pen. (It may be worth adding that there is a split in the circuits on whether the views of the employer-victim are relevant, with some circuits holding that cases can be brought even if the employer expressed its belief that the services the employee rendered were of value to it and chose to overlook the infraction.⁵³)

Perhaps reacting to the reality that, under the government’s formulation, convictions can be secured where there is no concrete or threatened tangible harm and no intent to harm, the Seventh Circuit has added an additional element requiring that the government prove that the defendant acted with the intent to secure a private or personal benefit as a result of the deprivation of honest services.⁵⁴ Presumably, this requirement is a rough proxy for some sort of corrupt intent to profit at the employer’s expense.

Numerous problems attend this limitation. It too is not well-established as a core element of honest-services fraud; indeed, it appears to be operative only in the Seventh Circuit. It is also both underinclusive and overinclusive and thus ineffective in identifying those cases worthy of criminal sanction. What we may believe to be a culpable breach may not involve an intent to gain. Rather, as the pattern jury instructions recognize, it may involve an intent to harm the employer with no corresponding gain to the defendant.⁵⁵ The intent to secure private gain limitation may also be overinclusive in that a breach of duties may ultimately result in a win-win situation, in which both the defendant and his employer gain. This may be the

53. See, e.g., *United States v. Bereano*, 161 F.3d 3, 4 (4th Cir. 1998) (unpublished opinion); *United States v. Bryza*, 522 F.2d 414, 422 (7th Cir. 1975). But see *D’Amato*, 39 F.3d at 1257.

54. See *United States v. Bloom*, 149 F.3d 649, 656-57 (7th Cir. 1998). But see *Welch*, 327 F.3d at 1106-07 (rejecting this additional element).

55. See, e.g., 1A FED. JURY PRAC. & INSTR. § 16:07 (6th ed. 2009) (defining intent to defraud and fraudulent intent). This instruction is widely used in many circuits:

To act with [“intent to defraud”] [“fraudulent intent”] means to act knowingly and with the intention or purpose to deceive or cheat. [An “intent to defraud”] [A “fraudulent intent”] is accompanied, ordinarily, by a desire or with a purpose to bring about some gain or benefit to oneself or to some other person or by a desire or with a purpose to cause a loss to some person.

reason why the Second Circuit has concluded that it is error for a district court to instruct the jury that “it could find an intent to defraud based solely on the appellants’ desire to gain a benefit for themselves.”⁵⁶

Finally, the Seventh Circuit’s test is imprecise in its application and of limited value in limiting § 1346 to worthy cases. There is uncertainty over what private or personal gain means: Does it include gain to one’s family members or other third parties? Must it be economic gain or can it relate to intangibles like enhanced reputation? The Seventh Circuit has clarified that by “‘private gain’ we simply mean illegitimate gain, which usually will go to the defendant, but need not.”⁵⁷ Recognizing that private gain may include benefits to persons other than the defendant certainly guts this limitation, but the government would dilute it further. Its apparent theory in *Skilling*, which it concedes is novel and which has been rejected by the Seventh Circuit,⁵⁸ is that the required private gain can relate to concerns about salary or job security. Where an employee lies about breaking an employment rule in order to safeguard his job or ensure that his salary is not docked, this would suffice. As *Skilling*’s counsel argued before the Court, such a reading of the private-gain requirement would make it applicable to virtually every employee in the country, thereby again threatening “to convert almost any lie in the workplace into an honest-services prosecution.”⁵⁹

C. Attendant Circumstances

Many of the circuits struggling to contain the reach of honest-services cases have chosen between two competing tests: reasonably foreseeable harm and materiality. (One circuit—the Second—adopted the materiality test but also may apply the reasonably foreseeable harm test to some private honest-services cases (involving self-dealing) but not others (involving bribery or kickbacks).⁶⁰) Neither test is grounded in statutory language or common law elements, nor are they effective in cabining the reach of the statute.

The reasonably foreseeable harm test—pressed on the Court by petitioner Black—has a number of iterations, but the gist is that the

56. *United States v. Frank*, 156 F.3d 332, 337 (2d Cir.1998).

57. *United States v. Sorich*, 523 F.3d 702, 709 (7th Cir. 2008).

58. *See, e.g.*, *United States v. Segal*, 495 F.3d 826, 834-835 (7th Cir. 2007); *United States v. Thompson*, 484 F.3d 877, 883 (7th Cir. 2007).

59. Transcript of Oral Argument at 26, *Skilling v. United States*, 130 S. Ct. 393 (No. 08-1394) (March 1, 2010).

60. *Rybicki*, 354 F.3d 124.

government must show that it was “reasonably foreseeable that the scheme could cause some economic or pecuniary harm to the victims” (with some courts requiring that that harm be more than de minimus).⁶¹ This limitation has no connection to the language of the statute or the traditional elements of fraud. The reasonably foreseeable harm test is *not* a gloss on or interpretation of the fraudulent intent element: it requires “neither . . . an actual economic loss *nor an intent to economically harm the employer*.”⁶² Instead, the test was fabricated in an attempt to cabin § 1346’s scope to cases in which the forbidden conduct has a proximate relationship to at least some potential demonstrable injury (and to preclude prosecution of cases such as the computer-misuse hypothetical posed above).

Even if this were a legitimate piece of judicial legislation, it is unlikely to be successful in its aim, as reference to the government’s brief in *Black* shows. One can almost always come up with some hypothetical harm unless the employment rule in question is completely arbitrary—along the lines of forbidding left-handed persons from wearing contact lenses at work. In cases of reasonable rules whose breach should not be subject to criminal sanction, a jury could reasonably hypothesize some imagined economic peril, since actual subjective intent is not required, just some proximate relationship to potential harm. For example, in our computer-misuse hypothetical, projected harm could flow from the fact that widespread flouting of a rule prohibiting personal use of computers could result in a marked decline in worker productivity and increased exposure to costly computer viruses.

The courts that adopt materiality as a limiting principle in private honest-services cases assert that this test has the virtue of being a preexisting element of any fraud case.⁶³ Actually, the courts’ use of materiality constitutes a questionable extension of that element. The materiality element of mail and wire fraud recognized by the Court in *Neder v. United States* requires the jury to decide whether the misrepresentation or actionable failure to disclose “has the natural tendency to influence or is capable of influencing the employer to change his behavior.”⁶⁴ To be clear, under *Neder*, it is the *fraudulent*

61. *Id.* at 145; see *Frost*, 125 F.3d at 368; *Sun-Diamond*, 138 F.3d at 973-74.

62. *United States v. Vinyard*, 266 F.3d 320, 329-30 (4th Cir. 2001) (emphasis added).

63. *Neder v. United States*, 527 U.S. 1, 25 (1999) (“[W]e hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes.”). The materiality approach has apparently been endorsed by the Second, Fourth, Fifth, Eighth, and Tenth Circuits. See *Rybicki*, 354 F.3d at 145 (collecting cases).

64. *Vinyard*, 266 F.3d at 328. This approach has apparently been endorsed by the Second, Fourth, Fifth, Eighth, and Tenth Circuits. See *Rybicki*, 354 F.3d at 145 (collecting cases).

misrepresentation or actionable omission that must be material. But, as Justice Scalia pointed out in oral argument, what these courts seem to be asking is a different question: Is the undisclosed *breach of employment duties* material in the sense that a reasonable employer would believe that this particular violation of workplace rules is important?⁶⁵

Regardless of whether this test is an appropriate application of the materiality element, it is imprecise in its application and likely to be ineffectual in isolating those cases where culpability is appropriate. First, as the Justices noted during oral argument, it is not clear what decision is the focus of the test: Must the misrepresentation or omission be material to the continued employment of the erring defendant (i.e., must it be a firing offense)?⁶⁶ Or is it, as some courts have indicated, simply a question of whether a hypothetical employer would change its employee policies or business practices to avoid similar conduct in future? As one circuit noted in rejecting this limitation, “if a ‘change in business conduct’ occurs under the materiality standard when a business alters its behavior merely to avoid the *appearance* of impropriety . . . , the intangible right to honest-services doctrine may lack substantive limits in the private sector.”⁶⁷ Moreover, if the company took the trouble of formulating the rule and making employees aware of it, presumably juries would conclude that a reasonable employer would wish the rule enforced. Assuming again that the breach at issue does not relate to some oddly arbitrary rule, one can conclude that all breaches and nondisclosures will meet the materiality test, and indeed, I am aware of no decision in which a lack of materiality has been found.

To return to our hypothetical, most circuits would hold that the statute—read on its face—subjects Susan to criminal liability for abusing her computer access.⁶⁸ Absent disclosure or a judicially created limitation, the result is that she, as an agent of ABC

65. Transcript of Oral Argument at 39-40, *Black v. United States*, 129 S. Ct. 2379 (No.08-876) (Dec. 8, 2009).

66. *See, e.g., id.* at 35-38.

67. *Frost*, 125 F.3d at 365.

68. As the Second Circuit has noted:

[A] customer who importunes an employee to allow her to use the company's telephone access code to make an important long-distance telephone call, in the face of a written company policy expressly prohibiting non-employees from using the access code, could conceivably fall within the scope of the statute if read literally. So too could an employee's use of his company's letterhead to lend authority to a letter of complaint mailed to the employee's landlord in disregard of the company's code of conduct prohibiting the use of the company's letterhead for non-company business.

United States v. Rybicki, 287 F.3d 257, 264 (2d Cir. 2002) (panel decision), *aff'd*, 354 F.3d 124 (en banc).

Company, would have a duty to the employer to follow the rules, as well as a duty to disclose her violations of applicable regulations. Hopefully, this hypothetical amply demonstrates the unconstitutional nature of this statute. Can anyone (not working for the government) argue with a straight face that the twenty-eight words of § 1346 give the ordinary citizen fair notice that de minimis breaches of employer-created rules such as Susan’s could warrant jail time? And, contrary to the government’s assertion, the caselaw does not define a core of conduct by which the average citizen can gauge her criminal exposure before the fact. In light of the many disagreements among the circuits on applicable limiting glosses, is it likely that even the most diligent layman would be able to forecast whether the caselaw would rule her workplace infraction in or out? I think not.

Finally, and most importantly, as Justice Breyer observed during oral argument, the breadth of this statute means that a federal prosecutor could bring an honest-services case against millions of working Americans: “I think there are . . . 150 million workers in the United States. I think possibly 140 [million] of them would flunk” the honest-services test.⁶⁹ With such a flexible weapon, prosecutors can choose a target and be almost certain that, with enough digging, they can find a criminal violation. If virtually anyone is vulnerable to prosecution, the potential for arbitrary and discriminatory enforcement is a given.

II. THE HONEST-SERVICES THEORY MAY PUNISH CONDUCT THAT IS NOT INHERENTLY MALICIOUS AND THAT IS NOT ACCOMPANIED BY ANY CORRUPT OR WRONGFUL INTENT

Assuming that the Supreme Court does not agree that § 1346 is unconstitutionally vague, one hopes that the Court at least will drastically curtail its scope. In the briefing and oral argument of these cases, much of the focus was on narrowing the type of conduct that § 1346 covers by, for example, restricting its application to cases involving bribery and kickbacks. Due to the peculiar nature of the honest-services theory of liability, however, the Court must also enhance the required mens rea to include an intent to injure as well as an intent to deceive.

The Supreme Court recently emphasized the importance of construing criminal prohibitions so as to ensure that the “requisite

69. Transcript of Oral Argument at 30, *United States v. Black*, 129 S. Ct. 2379 (No. 08-876) (Dec. 8, 2009).

consciousness of wrongdoing” is present.⁷⁰ This is particularly true in contexts where the act underlying the conviction may itself not be inherently malign.⁷¹ In such circumstances, “limiting criminality to [those] conscious of their wrongdoing sensibly allows [criminal statutes] to reach only those with the level of ‘culpability . . . we usually require in order to impose criminal liability.’ ”⁷² There are a number of reasons why § 1346 threatens those who lack the kind of culpability normally required for a criminal conviction and why an enhanced mens rea is required.

The first reason relates to the nature of the fraud prohibitions themselves: the actus reus underlying mail and wire fraud convictions—the mailings or interstate wirings at issue—are not inherently malign. The jurisdictional mailing or wiring can, in its content, be entirely innocent. Under Supreme Court caselaw, no necessary relation must be demonstrated between the culpable element (the intention to form a scheme to defraud) and the mailing or interstate wiring. To be part of the execution of the fraud, the mailing or wiring need not be an essential element of the scheme; it is “sufficient for the mailing [or wiring] to be ‘incident to an essential part of the scheme,’ or ‘a step in [the] plot.’ ”⁷³ The defendant also need not actually make the mailing or wiring because “where such use can reasonably be foreseen, even though not actually intended, then he ‘causes’ the mail to be used.”⁷⁴ Certainly no showing of mental culpability need attend the actual actus reus of the crime.

Although the statute is often applied to completed frauds, one must understand that the evil at which the statute is addressed—the scheme to defraud—can be entirely unrealized and existing only in the mind of the defendant.⁷⁵ This is because the mail and wire fraud statutes are inchoate offenses. They permit conviction of anyone who, “having devised or intending to devise any scheme or artifice to defraud,” causes a mailing or interstate wiring; the scheme need not ever come to fruition or cause any harm. Note that, unlike the inchoate crime of conspiracy, there is no requirement that two or more people agree to jointly commit the crime. Accordingly, there is no need

70. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005); *see also* *United States v. Aguilar*, 515 U.S. 593 (1995).

71. *Andersen*, 544 U.S. at 704.

72. *Id.* at 706 (quoting *Aguilar*, 515 U.S. at 602).

73. *Schmuck v. United States*, 489 U.S. 705, 710 (1989) (quoting *Badders v. United States*, 240 U.S. 391, 394 (1916)).

74. *Pereira v. United States*, 347 U.S. 1, 9 (1954).

75. *See, e.g.,* Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 773-76 (1980).

to prove the conspiratorial *actus reus*—the agreement—much less any overt act. And, unlike the inchoate crime of attempt, there is no necessity of showing that the defendant took a substantial step in furtherance of his illegal aims. In short, the mail and wire fraud statutes do not in terms punish a culpable act; they can be applied to criminally reprehensible thoughts, and in the honest-services area, those thoughts do not require any proof that the planned scheme poses a real danger of concrete harm.

One must then ask whether the scheme-to-defraud element, though it does not require that actual harm be identified, invariably identifies potential or completed conduct that anyone would know is plainly criminal by reference to a written code. In short, is the conduct that falls within the statutory prohibition inherently malign? The answer has to be “no,” given the peculiar history of the honest-services cases. Indeed, this theory of mail and wire fraud was created because the conduct at issue was (and still is) often not independently proscribed. It indeed may be entirely legal under federal and state law absent application of § 1346.

The honest-services theory of fraud was born of the fact that there was (and is) no generally applicable federal statute available to prosecute state and local political corruption.⁷⁶ Basically, federal prosecutors charged under the malleable mail and wire fraud statutes because Congress had not chosen to give them a statute specifically proscribing the conduct prosecutors deemed corrupt. No matter how worthy the prosecution, one must see the bootstrapping here: Where is the fraud (i.e., lies, deceit, etc.) in public corruption? The cases operate under the fiction that the gravamen of an honest-services case is not the corruption; it is the fraud of failing to *tell* the citizenry about the corruption or allegedly improper conduct.⁷⁷ (If the public official *does* disclose his alleged wrongdoing, there is no case.) Having met with success in pushing this theory in the public corruption area, prosecutors and courts then expanded the scope of the honest-services fraud theory to employees of private companies who (as prosecutors charged and courts agreed) assumed a duty to advise their employers of breaches of their terms of employment and were criminally responsible if they failed to do so. Again, the fiction is that it is not the breach of duty—e.g., bribery, kickbacks, or self-dealing—that is

76. See, e.g., O’Sullivan, *supra* note 4, at 660-65.

77. See, e.g., *United States v. Margiotta*, 688 F.2d 108, 144 (2d Cir. 1982) (Winter, J., dissenting in relevant part) (“After all, the only need served by resort to mail fraud in these cases is when a particular corruption, such as extortion, cannot be shown or *Congress has not specifically regulated certain conduct.*” (emphasis added)).

actionable, it is the failure to *tell* the employer about such breaches that constitutes criminal “fraud.”

Congress could have obviated this bootstrap (and all the ensuing confusion) by enacting criminal prohibitions that specifically outlined the contours of actionable state and local public corruption, as well as the undisclosed conflicts or self-dealing that could render private employees liable for failure to deliver their honest services. It has chosen not to do so, leaving significant room for the argument that the Court should refrain from doing so in its stead. It is also significant that Congress has chosen to address the supposed core of honest-services cases—bribery/kickbacks and self-dealing—in very limited circumstances. Thus, it has very carefully circumscribed the cases that may be pursued under the corruption statute applicable to federal officials,⁷⁸ and has only in very limited instances criminalized private commercial bribery.⁷⁹ As far as self-dealing or operating under a conflict of interest is concerned, the only provisions of Title 18 I know of on the subject apply solely to federal government officials.⁸⁰ Even then, these statutes prohibit officials operating under a perceived or potential conflict of interest from taking action in fairly narrow circumstances; certainly the statutes do not contain the kind

78. Given our focus on *Skilling*, which is a private honest-services case, I do not treat in text public cases. Similar considerations apply in that context as well. *See, e.g.,* Eliason, *supra* note 20, at 929 (“In recent years ... federal prosecutors increasingly have set aside the scalpel of the bribery and gratuities statute and have relied instead upon honest services mail and wire fraud to prosecute federal corruption.”); Beale, *supra* note 1, at 713 (Federal prosecutors have brought against state and local officials “not only cases based on allegations of bribery, but also prosecutions based upon ethical breaches that would not violate the criminal statutes regulating the conduct of federal officers and employees.”).

79. *See* 18 U.S.C. §§ 215 (receipt of commissions or gifts for procuring loans), 224 (bribery in sporting contests). Many states treat such conduct as a misdemeanor. For example, the leaders of the Salt Lake City bid Committee for the 2002 Olympic Winter Games were indicted on a private honest-services theory that was based on allegations that they bribed members of the International Olympic Committee to award the games to Salt Lake City. To prove that this violated a duty owed by these officials to their employer, as well as to sustain additional counts charged under the Travel Act, the government pointed to the Utah’s misdemeanor statute outlawing commercial bribery. *See* Utah Code Ann. § 76-6-508. In deciding to dismiss the Travel Act counts, the District Court concluded that “[t]he State of Utah has chosen not to prosecute defendants for violation of any Utah law. Nevertheless, under the guise of aiding Utah with its law enforcement, federal prosecutors have co-opted an obscure Utah misdemeanor bribery statute of uncertain and improbable application as the only basis for charging defendants with four federal Travel Act felonies.” *United States v. Welsh*, 248 F. Supp. 2d 1048, 1060 (D. Utah 2001). The dismissal of the Travel Act counts was reversed on appeal. *See United States v. Welsh*, 327 F.3d 1081 (10th Cir. 2003). After the Tenth Circuit reinstated the Travel Act counts on appeal, the defendants went to trial. Ultimately, the judge granted defendants’ motion for a judgment of acquittal.

80. *See, e.g.,* 18 U.S.C. §§ 203-205, 207-209.

of free-floating bar on self-dealing that the honest-services statute has been interpreted to contain.

The bootstrapping described above means that fraud is not the true gravamen of the crime, although it is the crime charged. Honest-services cases by definition do not threaten any harm of the kind normally required in fraud prosecutions—a quantifiable and concrete economic loss.⁸¹ It also means that the objectionable conduct that is the real gravamen of the crime—the breach of a duty of honest services, however defined—need not be independently proscribed as wrongful, much less criminal. Breaches of employment regulations may be unethical, perhaps meriting employment consequences or a civil suit, but the overwhelming majority do not involve inherently nefarious activity. Finally, the existing intent requirement does nothing to cure these ills. Indeed, it seems to contemplate a culpable mental state no more stringent than that required to give a time-out to a three year old: she knew the rules, broke them, and not unexpectedly declined to volunteer information about her wrong. Certainly it requires no awareness that what one is doing is in any way illegal. In such circumstances, the concerns underlying the vagueness doctrine are magnified. The law, let alone ordinary morality, provides no notice of the potential for jail time, and almost every working American could be targeted for prosecution if a prosecutor decides she is an attractive target.

III. IF THE COURT DECIDES TO LIMIT THE REACH OF THE STATUTE
RATHER THAN TO STRIKE IT DOWN AS VAGUE, THE COURT OUGHT TO
READ “INTENT TO DEFRAUD” TO INCLUDE
AN INTENT TO INJURE OR HARM

The government concedes that under the mail and wire fraud statutes it must prove that the defendant acted with the intent to defraud. But this requirement, in its view, is reducible to an intent to deceive in the context of an intentional violation of workplace rules, without any showing of intended or even foreseeable injury.⁸² This seems to me plainly wrong. If fraud required only an intent to *deceive*, then one wonders why every court describes the intent requirement as an intent to *defraud*. There is, of course, a difference. Fraud connotes not only deceit, but also deceit for a *purpose*—i.e., to take something of value, to which one is not otherwise entitled, through deception. Or, as

81. See *McNally*, 483 U.S. at 360, 358-59 (fraud is normally confined to cases involving threatened money-or-property harm).

82. Brief for the United States at 22, *Black v. United States*, No. 08-876 (citing cases).

Black's Law Dictionary concisely provides, fraud means "to cause injury or loss to (a person) by deceit." Accordingly, I believe that the Second Circuit has it half right: What should be required is an express recognition that an intent to defraud requires an intent to harm or injure but this jury charge should apply in *all* mail and wire fraud prosecutions, and *most particularly* in honest-services cases. Such a requirement will go far toward ensuring that some real mental culpability, as well as some threat of concrete harm, will undergird honest-services cases.

This reading also has the merit of being true to the spirit of common law fraud. It should be noted that the Supreme Court has been inconsistent in its directives on the relevance of common law conceptions of fraud to the construction of the mail and wire fraud statutes.⁸³ In the absence of clear guidance, it seems appropriate to refer to the common law for guidance, but also to adapt it to take account of the fact that these are criminal, not civil, cases, and to be responsive to the peculiar circumstances of the mail and wire fraud honest-services context. Courts generally agree that the basic elements of the common law tort of fraudulent misrepresentation, which is most closely aligned with fraud, are: "(1) an intentional misrepresentation (2) of fact or opinion (as distinct from a promise) (3) that is material and (4) intended to induce and (5) does induce reliance by the plaintiff, (6) proximately causing pecuniary harm to the plaintiff."⁸⁴ In terms of the mental element, fraud at common law required not only an intent to deceive, *but also an intent to induce someone to act in a way that leads to concrete harm.*

According to the *Restatement (Second) of Torts*—the source the Supreme Court referenced in defining materiality for purposes of the mail and wire fraud statutes⁸⁵—"[o]ne who fraudulently makes a representations of fact, opinion, intention or law *for the purpose* of inducing another to act or to refrain from action in reliance upon it, is

83. Compare *id.* (relying on common law to require proof of materiality), with *Bridge v. Phoenix Bond & Indemnity Co.*, 128 S. Ct. 2131, 2140 (2008) (rejecting common law rule in construing mail fraud, which is described as "a statutory offense unknown to the common law") and *Durland v. United States*, 161 U.S. 306, 312-313 (1896) (rejecting common law limitation). In *Neder v. United States*, 527 U.S. 1, the Supreme Court relied heavily on the "well-established rule of construction" that "Congress intends to incorporate the well-settled meaning of the common-law terms it uses," noting that Congress' use of the word defraud in the mail and wire fraud statutes raises a "presumption that Congress intended to incorporate the common-law meaning of the term 'fraud' in the mail fraud, wire fraud, and bank fraud statutes." *Id.* at 21, 23 & n.7. But more recently in *Bridge v. Phoenix Bond & Indemnity Co.*, the Court noted that common law understandings were not persuasive because mail and wire fraud are "statutory offense[s] unknown to the common law." 128 S. Ct. at 2140.

84. DAN B. DOBBS, *THE LAW OF TORTS* 1345 (2000).

85. *Neder*, 527 U.S. at 22 n.5.

subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.”⁸⁶ Commentary roughly contemporary with the enactment of the mail fraud statute in 1872 provides a similar definition of the intent element. As Justice Holmes explained in *The Common Law*: “It is said that a man is liable to an action for deceit if he makes a false representation to another, knowing it to be false, but *intending that the other should believe and act upon it*.”⁸⁷

The mail and wire fraud statutes are inchoate offenses; thus, courts universally hold that the scheme need not ever come to fruition or cause any harm. Nor must the victim actually be hoodwinked for criminal liability to attach. As the Supreme Court has repeatedly stated, “[t]he common-law requiremen[t] of ‘justifiable reliance’ . . . plainly ha[s] no place in the [mail, wire, or bank] fraud statutes.”⁸⁸ Nor does the civil requirement that the victim suffered actual economic damages.⁸⁹ The inchoate nature of the mail and wire fraud prohibitions, however, should not change the nature of the *intent* required.⁹⁰ Reference to the rules applied to other inchoate offenses—such as conspiracy and aiding and abetting—underscores the necessity of such a charge; both require that the defendant specifically intend to further the substantive offense.⁹¹ Although the scheme need not come to fruition, then, the requisite intent to defraud must include

86. RESTATEMENT (SECOND) OF TORTS § 525 (1977) (emphasis added).

87. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 132 (1881) (emphasis added); *see also* 2 CHARLES G. ADDISON, *A TREATISE ON THE LAW OF TORTS* § 1174, at 398 (H.G. Wood ed., 1876) (“[I]f a falsehood be knowingly told, with an *intention* that another person should believe it to be true, and act upon it, . . . the party telling the falsehood is responsible in damages in an action for deceit . . .” (emphasis added)).

88. *Neder*, 527 U.S. at 24-25; *see also Bridge*, 128 S. Ct. at 2138 (“Nothing on the face of the relevant statutory provisions imposes [a justifiable reliance] requirement. Using the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud, and hence a predicate act of racketeering under RICO, even if no one relied on any misrepresentation.”)

89. *Neder*, 527 U.S. at 24-25.

90. As the Second Circuit explained in *United States v. D'Amato*: “Essential to a scheme to defraud is fraudulent intent. The scheme to defraud need not have been successful or complete. Therefore, the victims of the scheme need not have been injured. However, the government must show ‘that some actual harm or injury was *contemplated* by the schemer.’” 39 F.3d at 1257 (internal citations omitted).

91. *See, e.g., Salinas v. United States*, 522 U.S. 52, 65 (1997) (“A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor.”); *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (“In order to aid and abet another to commit a crime it is necessary that a defendant ‘in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed.’”).

an intent to deceive *and* a purpose to cause detrimental reliance on the misrepresentation (or omission where there is a duty to disclose).⁹²

It is true that the common law of fraudulent misrepresentations did not in terms require proof of a malicious intent to harm or injure.⁹³ *But there was no need to make such a requirement express because it was already implicit in the required proof that the defendant intended to induce actual, justifiable reliance resulting in quantifiable damages.* Clearly, referencing the common law, mail and wire fraud should require some charge that reflects the required intent to cause actual detrimental reliance. But formulating a charge in these terms may confuse juries, leading them to believe that actual reliance and damages are required.⁹⁴ The intent requirement should be translated for jury instruction purposes as an intent to injure or harm. This formulation captures in more concise terms the essence of what is dangerous about even inchoate frauds—the intent to induce, through deceit, detrimental reliance that results in actual damages.

CONCLUSION

I hope that the Court strikes this unconstitutionally vague statute, returning to Congress the responsibility of defining the scope of criminal liability for workplace misconduct. If the Court elects instead to cabin the reach of § 1346, I trust that it will adopt an appropriately rigorous mens rea in addition to restricting the scope of the conduct which may subject every American worker to criminal liability.

92. “Common-law fraud . . . requires an intent to induce action by the plaintiff in reliance on the defendant’s misrepresentation.” *Kendrick*, 221 F.3d at 28.

93. *See id.* (citing sources).

94. *Id.* at 28-29.